No. 00-1514

In the Supreme Court of the United States

LANCE RAYGOR AND JAMES GOODCHILD, PETITIONERS

v.

REGENTS OF THE UNIVERSITY OF MINNESOTA

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The Minnesota Supreme Court held that 28 U.S.C. 1367(d), the tolling provision of the supplemental jurisdiction statute, is unconstitutional as applied to claims against a nonconsenting state defendant. The United States addresses the antecedent question of whether Section 1367(d) may fairly be construed to avoid that constitutional question.

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OPINIONS BELOW

The opinion of the Minnesota Supreme Court (Pet. App. A1-A15) is reported at 620 N.W.2d 680. The opinion of the Minnesota Court of Appeals (Pet. App. A16-A26) is reported at 604 N.W.2d 128. The opinion of the Hennepin County District Court (Pet. Br. App. B1-B13) is unreported.

JURISDICTION

The judgment of the Minnesota Supreme Court was entered on January 4, 2001. The petition for a writ of certiorari was filed on March 30, 2001, and was granted on June 4, 2001. The jurisdiction of this Court rests on 28 U.S.C. 1257(a). On October 9, 2001, the Court

granted the motion of the United States to intervene in the case pursuant to 28 U.S.C. 2403.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution is reproduced in the appendix to the brief. App., *infra*, 1a. Section 1367 of Title 28 is also reproduced in full in the appendix to the brief. App., *infra*, 1a-2a.

STATEMENT

1. The supplemental jurisdiction statute, 28 U.S.C. 1367, authorizes federal district courts to exercise jurisdiction over pendent state-law claims—*i.e.*, claims that would not, standing alone, come within a district court's original jurisdiction, but that "are so related to" claims within the court's original jurisdiction "that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. 1367(a). The statute generally tolls the limitations period for such claims while they are pending in federal court and for 30 days after they are dismissed. See 28 U.S.C. 1367(d). This case concerns the application of the statute—and, specifically, its tolling provision—to state-law claims against a nonconsenting state defendant.

Congress enacted the supplemental jurisdiction statute as part of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, to codify the common-law doctrines of pendent and ancillary jurisdiction. See H.R. Rep. No. 734 (House Report), 101st Cong., 2d Sess. 27-29 (1990); *City of Chicago* v. *International Coll. of Surgeons*, 522 U.S. 156, 165 (1997). In *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715 (1966), the Court had held that district courts, when

adjudicating federal-law claims within their subject-matter jurisdiction under 28 U.S.C. 1331, also may adjudicate state-law claims over which they would not otherwise have jurisdiction, if the federal-law and state-law claims "derive from a common nucleus of operative fact" and thus comprise "but one constitutional 'case'" under Article III. 383 U.S. at 725.

In a series of decisions after *Gibbs*, the Court identified various limits on a district court's ability to adjudicate claims that, although not independently within its subject-matter jurisdiction, are related to claims within its jurisdiction. See, *e.g.*, *Aldinger* v. *Howard*, 427 U.S. 1 (1976); *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365 (1978). In *Finley* v. *United States*, 490 U.S. 545 (1989), the Court held that a district court could not, in the absence of congressional authorization, exercise jurisdiction over pendent parties, *i.e.*, parties that are not the subject of any claim independently within the district court's jurisdiction.

Against that backdrop, the Federal Courts Study Committee recommended that "Congress expressly authorize federal courts to hear any claim arising out of the same 'transaction or occurrence' as a claim within federal jurisdiction, including claims, within federal question jurisdiction, that require the joinder of additional parties." *Report of the Federal Courts Study Committee* 47 (Apr. 2, 1990). See also *Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary* (*House Hearing*), 101st Cong., 2d Sess. 155-56 (1990) (statement of Judge Deanell R. Tacha, Chairman, Judicial Conference Committee On The Judicial Branch, expressing support for supplemental jurisdiction legisla-

tion); *id.* at 686 (letter from Professor Arthur D. Wolf noting academic support for such legislation). Congress responded by enacting 28 U.S.C. 1367, which generally codified the doctrine of pendent jurisdiction that was recognized in *Gibbs* and provided the congressional authorization that the Court found lacking in *Finley* by expressly permitting pendent party jurisdiction. See Arthur D. Wolf, *Codification of Supplemental Jurisdiction: Anatomy of a Legislative Proposal*, 14 W. New Eng. L. Rev. 1 (1992).

Section 1367 states, in relevant part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> * * * * *
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
>
> (1) the claim raises a novel or complex issue of State law.
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.
>
> (d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.
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> * * * * *

28 U.S.C. 1367.

2. In August 1995, petitioners filed charges with the Equal Employment Opportunity Commission (EEOC), alleging that the University of Minnesota discriminated against them in employment on the basis of age. The EEOC, pursuant to a work-sharing agreement, cross-filed the charges with the Minnesota Department of Human Rights (MDHR). Pet. Br. 3; Pet. App. A2-A3.

On June 6, 1996, the EEOC dismissed the charges and advised petitioners by letter that they had 90 days within which to file an action under the federal Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* On July 17, 1996, the MDHR likewise dismissed the charges and advised petitioners by letter that they had 45 days within which to file an action in state court under the Minnesota Human Rights Act (MHRA), Minn. Stat. ch. 363 (1991). Pet. Br. 3; Pet. App. A3.

Forty-four days later, on August 30, 1996, petitioners filed suit in federal district court, alleging violations of both the ADEA and the MHRA by the Regents of the University of Minnesota. Pet. Br. 4; Pet. 3-4. The Regents moved to dismiss both the federal-law and state-law claims on Eleventh Amendment grounds. Pet. Br. 4-5; Pet. App. A18.

On July 11, 1997, the district court granted the motion to dismiss. Pet. Br. 6; Pet. App. A3, A50. Petitioners appealed the dismissal of their ADEA claims to the Eighth Circuit. The appeal was stayed pending the disposition by the Eighth Circuit, and subsequently this Court, of other cases concerning the validity of Congress's abrogation of the States' Eleventh Amendment immunity from private suits under the ADEA. Pet. Br. 6; Pet. App. A3. Petitioners dismissed their appeal after this Court held, in *Kimel* v. *Florida Board of Regents*, 528 U.S. 62 (2000), that the ADEA does not validly abrogate the States' Eleventh Amendment immunity. Pet. Br. 6-7; Pet. App. A3.

3. a. On July 31, 1997, while the appeal of the dismisal of their ADEA claims was pending in the Eighth Circuit, petitioners filed this action in state court, alleging age discrimination by the Regents in violation of the MHRA. Pet. Br. 7; Pet. App. A3. The action was stayed until December 1998. Pet. Br. 7-8. The state trial court then lifted the stay to permit the Regents to move to dismiss the action on statute of limitations grounds. *Id.* at 8.

On March 28, 1999, the state trial court granted the motion. The court accepted the Regents' argument that petitioners' MHRA claims were untimely because they were not filed within 45 days after petitioners received notice that the MDHR had dismissed their charges. Pet. App. A28-A32. The court held that 28

U.S.C. 1367(d) did not apply to toll the statute of limitations on the MHRA claims, because the federal district court never had "original jurisdiction" over petitioners' ADEA claims within the meaning of 28 U.S.C. 1367(a). The court noted that the ADEA claims had been dismissed based on the Eleventh Amendment, which the court understood to "limit[] the jurisdictional reach of the federal courts." Pet. App. A29-A32.

The state trial court further concluded that equitable tolling was not appropriate as a matter of state law. The court reasoned that, wholly apart from the impact of the Eleventh Amendment on petitioners' ADEA claims, petitioners should have known from this Court's decision in *Pennhurst State School and Hospital* v. *Halderman*, 465 U.S. 89 (1984), that the Eleventh Amenment barred the federal courts from adjudicating their state-law claims against a state entity. Pet. App. A33-A37.

b. The Minnesota Court of Appeals reversed, holding that 28 U.S.C. 1367(d) tolled the statute of limitations for petitioners' MHRA claims while those claims were pending in federal court. Pet. App. A19-A24. In so holding, the court rejected the Regents' argument that Section 1367(d) applies only to pendent state-law claims that are dismissed under Section 1367(c) in an exercise of the district court's discretion, and does not apply to claims subject to mandatory dismissal under the Eleventh Amendment. *Id.* at A22-A23. In the alternative, the court of appeals ruled that the statute of limitations on petitioners' MHRA claims was equitably tolled while they were pending in federal court. *Id.* at A24-A25.

c. The Minnesota Supreme Court reversed. Pet. App. A2-A15. The court concluded that the application of 28 U.S.C. 1367(d) to toll the statute of limitations on

petitioners' MHRA claims against the Regents "is an unconstitutional infringement on state sovereign immunity in violation of the Eleventh Amendment." Pet. App. A2. The court, citing *Alden* v. *Maine*, 527 U.S. 706 (1999), reasoned that Congress has no power to expand the terms of a State's waiver of its immunity from suit in its own courts. Pet. App. A10-A14. The court assumed, without addressing the matter, that Section 1367(d) applies to toll the statute of limitations on all pendent state-law claims, regardless of the identity of the defendant or the ground on which the claim was dismissed. The court also reversed the appellate court's equitable tolling ruling. *Id.* at A14-A15.

SUMMARY OF ARGUMENT

The tolling provision of the supplemental jurisdiction statute, 28 U.S.C. 1367(d), is properly construed to avoid the constitutional question presented in this case —*viz.*, whether Congress may, consistent with the Eleventh Amendment and the doctrine of sovereign immunity, toll the statute of limitations for state-law claims asserted in state court against a nonconsenting state defendant. Interpreting Section 1367(d) to extend the statute of limitations for a state-law claim against a nonconsenting state defendant raises significant constitutional questions. When faced with two possible constructions of an Act of Congress, one of which presents serious constitutional questions and one of which avoids them, this Court adopts the latter construction so long as it is not "plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Two such saving constructions are available here.

I. The supplemental jurisdiction statute, and Section 1367(d) in particular, should be understood as not applying to state-law claims asserted against a nonconsenting state defendant. There is no indication that Congress intended the supplemental jurisdiction statute to abrogate the States' immunity from suit in federal court on state-law claims. Congress enacted the statute against the backdrop of this Court's decision in *Pennhurst State School and Hospital* v. *Halderman* (*Pennhurst II*), 465 U.S. 89 (1984), which held that the Eleventh Amendment bars the adjudication of such claims in federal court. Congress did not expressly attempt to reach state-law claims against nonconsenting States, even though it was aware that, in order to abrogate the States' sovereign immunity, it must make its intent "unmistakably clear in the language of the statute." *Dellmuth* v. *Muth*, 491 U.S. 223, 228 (1989).

There is no more reason to conclude that Congress intended to alter the States' immunity from suit under their own laws in their own courts. Any effort to modify the terms of a State's waiver of sovereign immunity in its own courts would be extraordinary and would raise serious constitutional concerns. The text of Section 1367(d) does not make any specific reference to claims against nonconsenting state defendants. Nor does the legislative record evince any intent by any member of Congress to apply the tolling rule to such claims. In light of Congress's silence, there is no reason to interpret Section 1367(d) in a counterintuitive and constitutionally provocative manner. Instead, this Court should construe Section 1367(d), in accordance with the canon of constitutional avoidance, as not applying to claims against nonconsenting state defendants.

II. Alternatively, Section 1367(d) should be understood to toll the limitations period only for pendent

state-law claims that are dismissed by the district court on grounds specified in the supplemental jurisdiction statute—for example, because "the claim raises a novel or complex issue of State law" or "the district court has dismissed all claims over which it has original jurisdiction," 28 U.S.C. 1367(c)(1) and (3). Section 1367(d) therefore does not apply to state-law claims that are dismissed for reasons independent of the supplemental jurisdiction statute, such as a lack of personal jurisdiction, inadequate service of process, failure to prosecute, or, as here, Eleventh Amendment immunity.

Such a construction of Section 1367(d) is consistent with the general statutory language, finds support in the legislative record, and limits the tolling rule to applications that further the goals of the supplemental jurisdiction statute. The congressional report accompanying the statute describes Section 1367(d) as applying only to claims dismissed "under this section." That restriction was expressly included in the text of Section 1367(d), as originally introduced, and does not appear to have been deleted for any substantive reason. Most commentators and courts agree that Section 1367(d) applies only to state-law claims that are dismissed for reasons specified in the supplemental jurisdiction statute, and not to claims that are dismissed on grounds unrelated to the statute, such as Eleventh Amendment immunity. Limiting the reach of Section 1367(d) to claims dismissed on the grounds specified in the statute avoids the constitutional difficulties identified by the Minnesota Supreme Court while promoting the proper functioning of the statute.

ARGUMENT

The Minnesota Supreme Court held that 28 U.S.C. 1367(d) is unconstitutional insofar as it tolls the statute

of limitations for state-law claims against state defendants. In reaching that conclusion, the Minnesota Supreme Court assumed that Section 1367(d) applies to every claim as to which the supplemental jurisdiction statute is invoked, without regard for whether the defendant is a State, as opposed to a private party, or whether the claim was dismissed on grounds specified in the statute, as opposed to other grounds. It made that assumption even though, in its view, such a construction rendered the statute unconstitutional. It thus failed to apply the "cardinal principle of statutory interpretation * * * that when an Act of Congress raises a serious doubt as to its constitutionality," courts should "first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Zadvydas* v. *Davis*, 121 S. Ct. 2491, 2498 (2001) (internal quotation marks and brackets omitted); accord, *e.g.*, *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 465-466 (1989); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring). Such a construction is, at a minimum, "fairly possible" here. Indeed, there is ample reason to conclude that Congress did *not* intend Section 1367(d) to toll the statute of limitations on state-law claims in the circumstances of this case.[1]

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[1] The canon of constitutional avoidance applies both when a statute raises serious constitutional questions in all applications

I. SECTION 1367, AND SECTION 1367(d) IN PARTICULAR, SHOULD BE UNDERSTOOD NOT TO APPLY TO STATE-LAW CLAIMS AGAINST NONCONSENTING STATE DEFENDANTS

Nothing in Section 1367 explicitly makes its provisions applicable to efforts to bring state-law claims against nonconsenting state defendants. Section 1367(a) provides a general grant of jurisdiction over state-law claims "that are so related to claims in the action within [the district courts'] original jurisdiction that they form part of the same case or controversy." 28 U.S.C. 1367(a). Section 1367(d) provides, in pertinent part, that "[t]he period of limitations for any claim asserted under subsection (a) * * * shall be tolled while the claim is pending and for a period of 30 days after it is dismissed." 28 U.S.C. 1367(d). Neither provision excludes, in so many words, state-law claims against nonconsenting state defendants. But both provisions should be construed, in accordance with the canon of constitutional avoidance, not to apply to such claims.

A. Interpreting Section 1367 To Apply To Nonconsenting States Raises Serious Constitutional Questions

Interpreting Section 1367 to apply to claims against non-consenting state defendants raises various constitutional difficulties. In the first place, if Section 1367(a)'s general grant of jurisdiction were read to authorize federal courts to adjudicate state-law claims against nonconsenting state defendants, that provision would violate this Court's constitutional holding in *Pennhurst II*. That decision explicitly held that the

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and, as here, when it raises such questions only in certain applications. See, *e.g.*, *Public Citizen*, 491 U.S. at 465-467.

Eleventh Amendment's "constitutional bar" to suits against nonconsenting States "applies to pendent claims." 465 U.S. at 120.

An interpretation of Section 1367(d) that would apply to nonconsenting state defendants likewise raises serious constitutional difficulties. In *Alden* v. *Maine*, 527 U.S. 706 (1999), this Court held that sovereign immunity principles inherent in the constitutional scheme prevent Congress, in the exercise of its Article I powers, from authorizing private suits against nonconsenting States in their own courts. Indeed, the Court explained that "a congressional power to authorize private suits against nonconsenting States in their own courts would be even more offensive to state sovereignty than a power to authorize the suits in a federal forum," because "the immunity of a sovereign in its own courts has always been understood to be within the sole control of the sovereign itself." *Id.* at 749; cf. *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 55 (1996) (holding that Congress, in the exercise of its Article I powers, cannot authorize private suits against nonconsenting States in federal court).

Congress would seem to interfere with a State's "sole control" over its immunity from suit in its own courts not only where, as in *Alden*, Congress authorizes a claim as to which a State has not waived its immunity at all, but also where Congress purports to expand the scope of a State's waiver of immunity. The latter may include Congress's expansion of the limitations period for claims against a State beyond the limitations period to which the State has consented. At a minimum, the question whether Congress may extend the limitations period for suits against a State in its own courts is a

serious one, which the Court should avoid reaching if possible.[2]

B. Interpreting Section 1367 As Inapplicable To Nonconsenting States Is Consistent With Congressional Intent And Avoids Constitutional Difficulties

A construction of Section 1367, and Section 1367(d) in particular, that excludes claims against nonconsenting state defendants cannot be said to be "plainly contrary to the intent of Congress." *DeBartolo*, 485 U.S. at 575. There is no indication in the statutory text or the legislative record that Congress intended Section 1367(d) to toll the limitations period for such claims. To the contrary, Section 1367, as a whole, suggests that Congress intended to respect, not to challenge, the States' sovereign immunity.

Congress enacted the Judicial Improvements Act of 1990, of which the supplemental jurisdiction statute was a part, against the backdrop of this Court's sovereign immunity jurisprudence. The Court had made clear six years earlier in *Pennhurst II* that the Eleventh Amendment bars federal district courts from exercising pendent jurisdiction over state-law claims against

[2] This Court has characterized the limitations period in an Act of Congress authorizing suits against the United States as "a central condition" of the United States' waiver of sovereign immunity. *United States* v. *Mottaz*, 476 U.S. 834, 843 (1986); see *United States* v. *Williams*, 514 U.S. 527, 534 n.7 (1995) (noting that such limitations periods operate to "narrow the waiver of sovereign immunity"); cf. *Henderson* v. *United States*, 517 U.S. 654, 677 (1996) (Thomas, J., dissenting) ("[W]e have long held that a statute of limitations attached to a waiver of sovereign immunity functions as a condition on the waiver and defines the limits of the district court's jurisdiction to hear a claim against the United States.") (citing cases).

nonconsenting state defendants. Nothing in its text or legislative history suggests that Section 1367 was designed to attempt to overrule *Pennhurst II*. Indeed, although an early draft of a supplemental jurisdiction legislation contained a provision that purported to overrule *Pennhurst II*, that provision was not included in the legislation as introduced. See Arthur D. Wolf, *Codification of Supplemental Jurisdiction: Anatomy of a Legislative Proposal*, 14 W. New Eng. L. Rev. 1, 48 (1992) (noting that "constitutional objections" had been raised to the provision); see also *id.* at 53 (text of provision).

As a general matter, even where Congress may constitutionally abrogate state sovereign immunity, Congress must "mak[e] its intention unmistakably clear in the language of the statute." *Dellmuth* v. *Muth*, 491 U.S. 223, 228 (1989). Section 1367 contains no such language.[3] Although the general jurisdictional grant in Section 1367(a) could be read to include claims against nonconsenting States, this Court has expressly warned against interpreting general grants of jurisdiction as congressional efforts to abrogate state sovereign immunity. See *e.g.*, *Blatchford* v. *Native Vill. of Noatak*, 501 U.S. 775 (1991); *Delmuth*, 491 U.S. at 231; *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 246 (1985). In

[3] To the contrary, Section 1367(a) specifies that it does not purport to create jurisdiction where it would conflict with the terms of another federal statute. See 28 U.S.C. 1367(a) (conferring jurisdiction over pendent claims, "[e]xcept as * * * expressly provided otherwise by Federal statute"). It is hard to conceive that the same Congress that declined to assert jurisdiction where it would conflict with a federal statute simultaneously would purport to assert jurisdiction where it would conflict with the Eleventh Amendment and sovereign immunity principles of the Constitution.

Blatchford, the Court declined to read a general grant of jurisdiction over suits brought by Indian tribes, 28 U.S.C. 1362, to apply to suits against nonconsenting States. What the Court said about Section 1362 in *Blatchford* applies with equal force to Section 1367(a): "the text is no more specific than § 1331, the grant of general federal-question jurisdiction to district courts, and no one contends that § 1331 suffices to abrogate immunity for all federal questions." 501 U.S. at 786. The better reading of a general jurisdictional grant, like Section 1367(a), is that it permits suits against a State where the State has waived immunity, or where Congress has elsewhere expressly abrogated that immunity, but does not permit suits against States in other circumstances. See *id.* at 786 n.4.

There is no more reason to conclude that Congress intended in Section 1367(d) to alter the scope of a nonconsenting State's immunity from state-law claims in state court than to conclude that Congress intended in Section 1367(a) to alter the scope of a nonconsenting State's immunity from state-law claims in federal court. The better reading is that Section 1367, in its entirety, has no application to nonconsenting States. The text of Section 1367(d) speaks generally of "any claim asserted under subsection (a)," and thus, like Section 1367(a), does not expressly apply to claims against nonconsenting state defendants. Nor is there any indication in the legislative record that any member of Congress understood Section 1367(d) to toll the limitations period for claims against such defendants.[4]

[4] The supplemental jurisdiction legislation is discussed in only one congressional committee report and in the record of only one congressional hearing. It was not the subject of any debate on the floor of the House or Senate during the consideration of the Judicial Improvements Act of 1990.

Indeed, Congress may well have assumed, in light of *Pennhurst II* and Section 1367(a)'s inapplicability to nonconsenting States, that no plaintiff would ever have an occasion to contend that Section 1367(d) applies to state-law claims brought against nonconsenting States. In view of this Court's holding in *Pennhurst II* that the Eleventh Amendment bars the adjudication of state-law claims against nonconsenting state defendants in federal court, Congress may have expected that plaintiffs would understand that such claims may be asserted, if at all, only in state court, and not in federal court under the supplemental jurisdiction statute. See Pet. App. A14 (affirming the state trial court's refusal to toll the limitations period on the state-law claims on equitable grounds because "under *Pennhurst [II]* it was clear the federal district court could not exercise jurisdiction over the supplemental MHRA claims").[5]

As is true of Section 1367(a), the general text of Section 1367(d) is sufficiently broad that it could be read to apply to nonconsenting States. In particular, it is possible to construe Section 1367(d) to extend the state statute of limitations against a nonconsenting state defendant in state court even when, as is the case here, the State has not consented to federal-court jurisdiction over the state-law claims and so Section 1367(a), properly understood, does not apply. But such an effort to modify the terms of a State's consent to suit in state

[5] Indeed, the assertion of federal power to extend the state statute of limitations against a nonconsenting state defendant would be particularly inappropriate in this case. Here, the federal courts lacked jurisdiction not only over the pendent state-law claims against respondents under *Pennhurst II*, but also, as *Kimel* made clear, over the federal claims.

court would be extraordinary and raise serious constitutional questions. Even if such interference with "state sovereign immunity is theoretically possible, there is no reason to believe that Congress ever contemplated such a strange notion." *Blatchford*, 501 U.S. at 785-786. The same factors that have made courts reluctant to infer a congressional intent to override States' immunity from suit in federal court counsel against inferring a congressional intent to override States' immunity from suit in state court. Section 1367 should thus be construed as having no application to nonconsenting States in order to avoid Eleventh Amendment and other sovereign immunity problems.

A state defendant may, of course, consent to a district court's exercise of supplemental jurisdiction over state-law claims, which may encompass consent to the tolling rule of Section 1367(d). Cf. *Blatchford*, 501 U.S. at 786 n.4. For example, where a district court has original jurisdiction over a claim as to which a State's immunity has validly been abrogated (*e.g.*, a claim under Title VII of the Civil Rights Act of 1964), the State may decide for reasons of efficiency to consent to supplemental jurisdiction over a closely related state-law claim. And, even if the State subsequently revokes its consent, and thereby forces the plaintiff to refile the state-law claim in state court, the revocation may not apply retroactively; Section 1367(d) may toll the limitations period for the period during which the case remained in district court with the State's consent. Absent the State's initial consent to the exercise of supplemental jurisdiction, however, Section 1367(d) should not be understood to apply to such claims.

In sum, Section 1367(d) may reasonably be construed, without conflicting with any expression of congressional intent, as not applying to state-law claims against non-

consenting state defendants. The Court should adopt such a construction of Section 1367(d), as opposed to the construction assumed by the Minnesota Supreme Court, in order to avoid serious constitutional doubts as to whether Congress may toll the statute of limitations on state-law claims against nonconsenting state defendants in state court.

II. SECTION 1367(d) DOES NOT APPLY TO STATE-LAW CLAIMS THAT ARE DISMISSED FOR REASONS UNRELATED TO THE TERMS OF THE SUPPLEMENTAL JURISDICTION STATUTE

Section 1367(d) may also be understood to apply only to state-law claims that are dismissed on grounds specified in the supplemental jurisdiction statute, and thus not to claims dismissed on other grounds, such as Eleventh Amendment immunity. That alternative construction of Section 1367(d) likewise would enable the Court to avoid reaching the constitutional question in this case.

A. The Text, Legislative Record, And Underlying Purpose Of The Supplemental Jurisdiction Statute Support A Narrow Reading Of Section 1367(d)

As noted above, Section 1367(d), in general terms, tolls the limitations period "for any claim asserted under subsection (a)." Section 1367(d) thus does not expressly confine its tolling rule to claims that are dismissed on the grounds stated in the supplemental jurisdiction statute. But, in light of the canon of constitutional avoidance, Section 1367(d) may fairly be construed to contain that limitation. Such a construction comports with the statutory text, finds support in the legislative record, and serves distinct congressional purposes.

First, the statutory text is compatible with the view that Section 1367(d) addresses the unique difficulties that arise when claims are dismissed on the grounds specified in the supplemental jurisdiction statute. Section 1367(d), notwithstanding its reference to "any claim," does not reach *every claim* asserted under Section 1367(a) that is dismissed for any reason. For example, if a district court dismisses a claim on the merits, the tolling rule clearly has no application. Professors Arthur Wolf and John Egnal, who assisted in drafting the supplemental jurisdiction statute (see House Report 27 n.13), made that point expressly in a submission for the record of a congressional hearing on the statute. "Of course," they explained, "if the court dismisses the non-federal claim on the merits, this subsection [*i.e.*, the tolling provision] is not intended to give the pleader a second chance that the pleader would not ordinarily have under state law." *House Hearing* 695, 697. Accordingly, Section 1367(d) does not reach every claim that its general terms might be construed to reach, and is clearly susceptible to a narrowing construction.

Second, the legislative record affirmatively indicates that Congress did *not* intend to toll the limitations period for pendent state-law claims that are dismissed for reasons unrelated to the supplemental jurisdiction statute. Instead, Congress contemplated that Section 1367(d) would apply only to claims dismissed *under that statute*.[6]

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[6] Whatever value legislative history has an interpretative tool as a general matter, it is clearly useful in confirming the general presumption, reflected in *Ashwander* and its progeny, that Congress legislates within constitutional limits. See, *e.g.*, *Benoni* v. *Boston and Maine Corp.*, 828 F.2d 52, 57 (1st Cir. 1987) (noting that consideration of "legislative history is not only appropriate, but mandatory" when it suggests a construction of a statute that avoids constitutional questions); see also *Securities and Exchange Commission* v. *Wall Street Publishing Inst., Inc.*, 851 F.2d 365, 368 n.5 (D.C. Cir. 1988) (relaxing normal rule against considering arguments not raised below "in light of our obligation to avoid unnecessary adjudication of constitutional claims when a statute's language *or legislative history* admits of a limiting construction") (emphasis added), cert. denied, 489 U.S. 1066 (1989).

As originally drafted and introduced in the 101st Congress, H.R. 5381, the legislation that contained the supplemental jurisdiction statute, tolled the limitations period for a pendent claim (there referred to as a "non-Federal claim") while the claim was pending in district court and for 30 days "after it is dismissed *under subsection (c)*." *House Hearing* 30 (quoting H.R. 5381, 101st Cong., 2d Sess. § 120(a) (1990)) (emphasis added). Subsection (c), in turn, directed that a district court "*shall* dismiss or remand the non-Federal claim if it is not a permissible claim under subsection (a)," *e.g.*, if the non-federal claim does not "arise out of the same transaction or occurrence or series of transactions or occurrences" as the federal claim. *Id.* at 29, 30 (emphasis added). Subsection (c) further directed that a district court "*may* dismiss or remand the non-Federal claim if * * * (1) the Federal claim is dismissed; (2) the non-Federal claim substantially predominates over the Federal claim; or (3) the non-Federal claim should be tried separately." *Id.* at 30 (emphasis added). No provision was made for the tolling of the limitations period in any other circumstance, *i.e.*, where the supplemental claim was dismissed for reasons other than those specified in subsection (c) (and, by cross-reference, subsection (a)). Thus, the tolling provision would have expressly applied only to state-law claims that were dismissed

either as not "permissible" under subsection (a) or for the discretionary reasons specified in subsection (c).

In the version of H.R. 5381 that Congress ultimately enacted, Section 1367(d) does not retain the explicit reference to claims "dismissed under subsection (c)." But nothing in the legislative record suggests that the reference was deleted in order to broaden the reach of the tolling provision.[7] To the contrary, the House Report accompanying the final version of H.R. 5381 confirms that subsection (d) "provides a period of tolling of statutes of limitations for any supplemental claim that is dismissed *under this section*." House Report 30 (emphasis added); see also 136 Cong. Rec. 36,291 (1990) (Sen. Grassley) (submitting identical explanation of tolling provision to Senate). The House Report thus does not contemplate that Section 1367(d) would toll the limitations period if a state-law claim was dismissed for reasons unrelated to the terms of the supplemental jurisdiction statute.

Third, this limiting construction of Section 1367(d) avoids serious doubt about the provision's constitutionality, yet permits Section 1367(d) to remedy a specific problem that arose in the wake of *Gibbs*. Specifically, this reading of Section 1367(d) allows district courts to exercise their discretion to dismiss pendent state-law claims that would more appropriately be adjudicated in state court, without concern that those claims would be time-barred when refiled in state court.

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[7] The final version of H.R. 5381 likewise does not retain the explicit directive included in the original version of subsection (c) that a district court dismiss any state-law claim that "is not a permissible claim under subsection (a)." But such a requirement, of course, remains implicit in the statute.

The common-law doctrine of pendent jurisdiction did not toll the statute of limitations for pendent state-law claims. In *Gibbs*, this Court emphasized that federal courts could exercise jurisdiction over pendent state-law claims as a matter "of discretion, not of plaintiff's right." *United Mine Workers of Am.* v. *Gibbs*, 383 U.S. 715, 726 (1996). Thus, the Court explained that a district court, in the exercise of its discretion, should dismiss pendent state-law claims, without prejudice, where warranted by considerations of comity, judicial economy, convenience, or fairness to litigants. *Id.* at 726-727; see *id.* at 726 (suggesting that dismissal would often be appropriate, for example, "if the federal claims are dismissed before trial" or "if it appears that the state issues substantially predominate").

The district courts' consideration of those factors often was skewed, however, by the concern that, if the court exercised discretion to dismiss a state-law claim, the claim might be deemed untimely if refiled in state court. That concern tended to overwhelm any factors that would counsel against retaining jurisdiction over a state-law claim. Indeed, several courts of appeals held it to be an abuse of discretion for a district court to dismiss pendent claims without taking into account whether the claim would be time-barred in state court.[8]

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[8] See, *e.g.*, *Giardiello* v. *Balboa Ins. Co.*, 837 F.2d 1566, 1571 (11th Cir. 1988); *Cooley* v. *Pennsylvania Hous. Fin. Agency*, 830 F.2d 469, 476 (3d Cir. 1987); *Henson* v. *Columbus Bank & Trust Co.*, 651 F.2d 320, 325 (5th Cir. 1981) (per curiam); *O'Brien* v. *Continental Ill. Nat. Bank & Trust Co.*, 593 F.2d 54, 64-65 (7th Cir. 1979). Some courts made a discretionary dismissal of pendent claims contingent upon the defendant's waiver of any applicable statute of limitations defense. See, *e.g.*, *Edwards* v. *Okaloosa County*, 5 F.3d 1431, 1435 n.3 (11th Cir. 1993); *Duckworth* v. *Franzen*, 780 F.2d 645, 657 (7th Cir. 1985), cert. denied, 479 U.S.

This Court expressed similar concerns in addressing the related question whether district courts could remand to state court, rather than dismiss, pendent state-law claims in cases originally filed in state court and then removed to federal court. The Court concluded that "a remand generally will be preferable to a dismissal when the statute of limitations on the plaintiff's state-law claims has expired before the federal court has determined that it should relinquish jurisdiction over the case." *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343, 351-352 (1988). In such a case, the Court observed, dismissal "may work injustice to the plaintiff," because "a dismissal will foreclose the plaintiff from litigating his claims." *Id.* at 352.[9] As a consequence of concerns about leaving plaintiffs without a state-law remedy, the district courts would retain jurisdiction over cases that, apart from those concerns, properly belonged in state court. *Id.* at 352 n.10.[10]

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816 (1986); *Financial Gen. Bankshares, Inc.* v. *Metzger*, 680 F.2d 768, 778 (D.C. Cir. 1982).

[9] Congress subsequently enacted legislation to make a remand mandatory, rather than discretionary, when, as in *Cohill*, subsequent events deprive the district court of subject-matter jurisdiction. See 28 U.S.C. 1447 (1994 & Supp. V 1999).

[10] A subcommittee of the Federal Courts Study Committee, after examining the practice of the district courts under *Gibbs*, noted that "most courts retain jurisdiction over state claims regardless of their complexity, novelty, or predominance," except where all federal claims were dismissed before trial. 1 Federal Courts Study Committee, *Working Papers and Subcommittee Reports* (Report of the Subcommittee on the Role of the Federal Courts and Their Relationship to the States) 561-562 (July 1, 1990). The subcommittee recommended that any supplemental jurisdiction statute direct the district courts to dismiss state-law claims in all of those circumstances. *Id.* at 562. Neither the recommendation of the Federal Courts Study Committee nor the draft statute

The proponents of the supplemental jurisdiction legislation expressed related concerns about the district courts' retaining pendent claims that might more appropriately be adjudicated in state court. For example, Judge Joseph F. Weis, Jr., the chairman of the Federal Courts Study Committee, urged Congress that "supplemental jurisdiction not be used to let the tail [of a federal-law claim] wag the dog [of a case in which state-law claims predominate]." *House Hearing* 95. "Thus," said Judge Weis, "when a state claim predominates, the district court should be authorized and encouraged to decline the exercise of supplemental jurisdiction," because "[t]o proceed in the face of state claim predominance would be an affront by a district court to considerations of comity and federalism." *Ibid.*

Section 1367(d) allows district courts to assess whether to retain jurisdiction over state-law claims free from concerns about whether the claims, if dismissed, could be timely filed in state court. It, therefore, eliminates the incentive for district courts to retain jurisdiction over state-law claims that, for reasons of comity or otherwise, are better suited for adjudication in state court. See John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. Davis L. Rev. 855, 945 (1998) ("Congress clearly intended subsection 1367(d) to facilitate discretionary dismissal under subsection 1367(c) by relieving courts of concerns about the inequitable consequences of state limitations law barring the dis-

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prepared by its Subcommittee on the Role of the Federal Courts specifically addressed the tolling of the statute of limitations for state-law claims. The tolling provision was contained in the draft supplemental jurisdiction legislation submitted to Congress by Professors Wolf and Egnal. See *House Hearing* 686-687.

missed claim from refiling."). No comparable purpose is served by giving the benefit of tolling under Section 1367(d) to a plaintiff whose state-law claim is dismissed for mandatory reasons unrelated to the supplemental jurisdiction statute, such as lack of personal jurisdiction, improper service, failure to state a claim, or Eleventh Amendment immunity.[11]

Finally, as noted, a construction of Section 1367(d) that limits tolling to claims dismissed under the supplemental jurisdiction statute avoids the serious constitutional questions raised by a construction that would allow tolling for claims dismissed on Eleventh Amendment grounds. Indeed, apart from the special concerns raised by a construction that could apply Section 1367(d) to expand the scope of a State's waiver of sovereign immunity, there are reasons to favor a narrow construction. Even in cases involving only private litigants, "States have an interest in the prompt and efficient resolution of controversies based on state law." *Cohill*, 484 U.S. at 353. While tolling the state limitations period is justified in aid of federal court jurisdiction to address the unique problems created by pendent jurisdiction, there is less justification for tolling the state limitations period when the state-law claims are dismissed for defects having nothing to do with the supplemental jurisdiction statute. In light of the legislative record and the fact that Section 1367(d) accomplishes its key purposes even if limited to claims

[11] Statute of limitations concerns figure prominently in cases involving pendent claims, because the district court is required to consider whether to retain discretionary jurisdiction over pendent claims "throughout the litigation." *Cohill*, 484 U.S. at 351; see also *Gibbs*, 383 U.S. at 727. Dismissals on grounds not related to the supplemental jurisdiction statute, by contrast, are often the result of threshold inquiries that involve no element of discretion.

dismissed under the statute, there is no reason to adopt a broad and constitutionally problematic construction of Section 1367(d).

B. Most Courts And Commentators Have Read Section 1367(d) Narrowly

Wholly apart from any concern for avoiding difficult constitutional questions, most commentators view Section 1367(d) as not applying to pendent state-law claims that are dismissed for reasons unrelated to the terms of the supplemental jurisdiction statute. At least two courts have also expressed that view.

Some commentators have interpreted Section 1367(d) to apply only to state-law claims that are dismissed for the discretionary reasons stated in Section 1367(c). For example, one leading treatise, after acknowledging that "in this respect, as in others, § 1367 could have been more clearly drafted," concludes that "the tolling provision of (d) should be read as coming into play only if the court exercises its discretion, under § 1367(c), to dismiss a supplemental claim of which it has jurisdiction under subsection (a)." 13B Charles A. Wright et al., *Federal Practice and Procedure* § 3567.1, at 46 n.51 (Supp. 2001). Thus, if a district court "dismisses a claim because that claim is not properly within the court's jurisdiction, § 1367(d) should have no[] application." *Ibid.* Similarly, Professor John B. Oakley observes that, although the text of Section 1367(d) creates some "uncertainty" as to its reach, a "close reading of the legislative history conclusively supports" construing Section 1367(d) to apply "only to 'any claim properly asserted under subsection (a)' that the district court dismissed not for lack of supplemental jurisdiction, but rather because the district court elected not to exercise supplemental jurisdiction for one of the discretionary

reasons permitted by subsection 1367(c)." Oakley, *supra*, 31 U.C. Davis L. Rev. at 945; see also 16 *Moore's Federal Practice* § 106.66[3][c] (3d ed. June 2001) ("Under Section 1367, if the claim is *validly* within the court's supplemental jurisdiction under subsection (a), the period of limitations is tolled while the claim is pending and for a period of 30 days after it is dismissed unless state law provides for a longer tolling period.") (emphasis added). The American Law Institute (ALI) shares the view that Section 1367(d) "tolls the period of limitations only as to supplemental claims dismissed discretionarily because the district court declines to exercise supplemental jurisdiction." *Federal Judicial Code Revision Project, Tentative Draft No. 2*, at 99 (1998) (approved at the ALI's annual meeting on May 14, 1998).[12]

Two courts have also concluded that Section 1367(d) applies only to state-law claims dismissed for one of the reasons stated in Section 1367(c). See *Ovadia* v. *Bloom*, 756 So. 2d 137, 139 (Fla. Dist. Ct. App. 2000) (Section 1367(d) does not apply when the federal action was dismissed for lack of complete diversity); *Parrish* v. *HBO & Co.*, 85 F. Supp. 2d 792, 796-797 (S.D. Ohio 1999) (Section 1367(d) applies only to claims dismissed under Section 1367(c)).

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[12] The ALI has drafted a revised supplemental jurisdiction statute that would, among other things, "expand[]" the tolling provision "to embrace supplemental claims dismissed because the district court lacks subject-matter jurisdiction as well as supplemental claims dismissed because the district court has declined to exercise its supplemental jurisdiction." *Federal Judicial Code Revision Project, Tentative Draft No. 2*, at 98-99; see *id.* at 98 (draft legislation providing for tolling of limitations period for "any supplemental claim dismissed because the district court lacks or declines to exercise supplemental jurisdiction").

Some commentators have concluded that Section 1367(d) tolls the limitation period not only for pendent state-law claims dismissed on the discretionary grounds provided in Section 1367(c), but also for pendent claims dismissed because the prerequisites of Section 1367(a) or (b) have not been met. In their view, the tolling provision would apply to a pendent claim that was dismissed because, for example, the pendent claim was not sufficiently related to a claim over which the court has original jurisdiction. See, *e.g.*, Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 Ariz. St. L.J. 849, 985 (1992) ("[I]t would appear that the intent of the drafters was to extend tolling protection to a dismissed supplemental claim, but only when the dismissal results from the failure of the claim to satisfy one of the supplemental jurisdictional requirements of § 1367(a)-(c) and not because of some other defect.").

The majority view, however, and perhaps the better one, is that Section 1367(d) tolls the limitations period only for claims dismissed for the discretionary reasons set forth in Section 1367(c). But the Court need not definitively resolve that question because, whether or not Section 1367(d) applies to dismissals under Section 1367(c) alone or to dismissals for failure to meet the prerequisites of Section 1367(a) and (b) as well, it does not apply to pendent claims, such as those here, that are dismissed for independent reasons.[13]

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[13] We are not aware of any decision, other than the decision of the Minnesota Court of Appeals in this case, holding that Section 1367(d) applies to state-law claims that are dismissed for reasons unrelated to the terms of the supplemental jurisdiction statute. But see *Stevens* v. *ARCO Management of Washington D.C., Inc.*, 751 A.2d 995, 997-1002 (D.C. 2000) (endorsing, in dicta, the reason-

C. A Narrow Construction Of Section 1367(d) Does Not Foreclose The Application Of State Tolling Rules To State-Law Claims

An interpretation of the tolling provision that encompasses only claims dismissed under Section 1367, and not claims dismissed under other sources of law, does not leave plaintiffs who mistakenly file state-law claims in federal court without any possibility of relief from the running of a statute of limitations. Such a construction simply leaves full responsibility for providing such relief with the States.

It is quite common for state law to provide for the tolling of the limitations period for claims that are initially filed in the wrong court. See McLaughlin, *supra*, 24 Ariz. St. L.J. at 982-983 (noting that "a number of states provide for statutory tolling when an action is timely commenced in one court and is thereafter dismissed without prejudice," and that "[s]till other states have no statutory provision for tolling, but permit tolling on a case-by-case basis under the doctrine of equitable tolling"); see also *Burnett* v. *New York Cent. R.R.*, 380 U.S. 424, 431-432 & n.9 (1965) (noting state "saving" statutes). Section 1367(d) reflects Congress's awareness of such state tolling rules. See 28 U.S.C. 1367(d) (tolling the statute of limitations for 30 days "unless State law provides for a longer tolling period").

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ing of the Minnesota Court of Appeals). A few commentators have taken that view. See, *e.g.*, Brian A. Beckcom, *Pushing the Limits of the Judicial Power: Tolling State Statutes of Limitations Under 28 U.S.C. § 1367(d)*, 77 Tex. L. Rev. 1049, 1074 n.168 (1999) ("§ 1367(d) would toll state statutes of limitations regardless of the reason for dismissal, unless the claim is dismissed on the merits").

A State may, of course, decide to apply its own tolling provisions to claims dismissed in federal court on Eleventh Amendment grounds. Indeed, state tolling provisions may provide a degree of protection to plaintiffs in some of the circumstances suggested by petitioners, such as where a state defendant engages in conduct indicating consent to federal court jurisdiction over a pendent state-law claim, and then asserts an Eleventh Amendment objection after the statute of limitations has run on the claim. Such an approach allows state courts to address inequities but leaves control over the terms of a State's waiver of sovereign immunity with the State itself.[14]

CONCLUSION

The judgment of the Supreme Court of Minnesota should be affirmed based on a construction of Section 1367 that avoids serious constitutional difficulties.

Respectfully submitted.

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[14] Plaintiffs, of course, also may seek to protect themselves by simultaneously filing suit in federal and state court and asking the state court to stay its hand until the federal court has determined whether to hear the pendent claim on the merits.

APPENDIX

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Section 1367 of Title 28 of the United States Code provides:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental

jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.